

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re the matters of)
)
Imposition of Forfeiture Against)
)
CAPITOL RADIOTELEPHONE INC.)
d/b/a Capitol Paging)
1420 Kanawha Blvd E.)
Charleston, West Virginia 25301)
)
Former Licensee of Station WNSX-646 in)
the Private Land Mobile Radio Services)
)
and)
)
Revocation of License of)
)
CAPITOL RADIOTELEPHONE INC.)
d/b/a Capitol Paging)
1420 Kanawha Blvd E.)
Charleston, West Virginia 25301)
)
Licensee of Station WNDA-400 in the)
Private Land Mobile Radio Services)
)
and)
)
Revocation of License of)
)
CAPITOL RADIOTELEPHONE INC.)
d/b/a Capitol Paging)
1420 Kanawha Blvd E.)
Charleston, West Virginia 25301)
)
Licensee of Station WNWW-636 in the)
Private Land Mobile Radio Services)
)
and)
)

PR Docket No. 93-231

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Revocation of License of)
)
CAPITOL RADIOTELEPHONE INC.)
1420 Kanawha Boulevard East)
Charleston, West Virginia 25301)
)
Licensee of Station KWU-373 in the)
Public Mobile Radio Service)
)
and)
)
Revocation of License of)
)
CAPITOL RADIOTELEPHONE)
COMPANY, INC.)
P.O. Box 8305)
South Charleston, West Virginia 25303)
)
Licensee of Station KUS-223 in the)
Public Mobile Radio Service)
)
and)
)
Revocation of License of)
)
CAPITOL RADIOTELEPHONE CO., INC.)
1420 Kanawha Boulevard East)
Charleston, West Virginia 25301)
)
Licensee of Station KQD-614 in the)
Public Mobile Radio Service)
)
and)
)
Revocation of License of)
)
CAPITOL RADIOTELEPHONE)
COMPANY, INC.)
1420 Kanawha Boulevard)
East Charleston, West Virginia 25301)
)

To: The Commission, *en banc*

The Acting Chief, Wireless Telecommunications Bureau (the Bureau), hereby files her Opposition to the Application for Review of CAPITOL RADIOTELEPHONE COMPANY INC. (a/k/a Capitol Radiotelephone, Inc. or Capitol Radio Telephone, Inc.) d/b/a CAPITOL PAGING ("Capitol").

¹ Pursuant to 47 C.F.R. § 1.115(d), oppositions to this Application for Review had to be filed no later than 15 days after its filing, on or before April 9, 1996. On April 5, 1996, the Chief, Wireless Telecommunications Bureau, filed a Consent Motion for Extension of Time through April 19, 1996, to file this Opposition.

on its own motion, struck from the Initial Decision adverse findings and conclusions relating to RAM Technologies, Inc. (RAM), a Commission licensee and party to this case whose licenses had not been designated for hearing and against whom no issues were specified. In its Application for Review, Capitol asks the Commission to reinstate the Initial Decision in all respects. For the reasons stated below, the Bureau opposes Capitol's Application for Review.

I. The Commission Specifically Designated, as Separate and Distinct Issues for Hearing, Whether Capitol Violated Sections 90.403(e), 90.405(a)(3) and 90.425(b)(2) of the Commission's Rules.

2. In its Application for Review, Capitol appears to ascribe significance to other aspects of this case, such as (1) other designated issues and (2) Commission and staff characterizations outside of the hearing environment, for the proposition that, essentially, the rule violations that the Review Board found warranted a forfeiture against Capitol were not the essence of the Private Radio Bureau's case, or the primary reason for designation of this matter for hearing. No significance should be ascribed to other matters that were designated for hearing, or what else the Private Radio Bureau tried to prove. In its *Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing (HDO)*, 8 FCC Rcd 6300 (1993), the Commission duly specified issues against Capitol with regard to each of the three rule violations found by the Review Board. Issue "b" in the *HDO* concerned whether Capitol's transmissions on August 12, 13, 14 and 15, 1991 violated Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e), requiring licensees to take reasonable precautions to avoid causing harmful interference including taking such measures as may be necessary to minimize the potential for causing interference. Issue "d" in the *HDO* concerned whether Capitol's transmissions on August 12, 13, 14 and 15, 1991 violated Section 90.405(a)(3) of

the Commission's Rules, 47 C.F.R. § 90.405(a)(3), requiring licensees to keep tests to a minimum and to employ every measure to avoid harmful interference. Issue "e" in the *HDO* concerned whether Capitol's transmissions on August 12, 13, 14 and 15, 1991 violated Section 90.425(b)(2) of the Commission's Rules, 47 C.F.R. § 90.425(b)(2), requiring licensees to maintain a Morse Code transmission rate between 20 and 25 words per minute when using automatically activated equipment to transmit their station identifications. These issues were clearly specified and properly the subject of this hearing proceeding. Any inference to the contrary, or effort on Capitol's part to minimize their importance, is misplaced.

II. The Review Board Properly Exercised Its Authority to Make De Novo Findings of Fact.

3. The Review Board made its own findings of fact on the issues concerning Capitol's rule violations because the *Initial Decision* glossed over evidence indicating that Capitol may have been derelict in its operations of the station. *Decision* at ¶ 8. The Review Board also reversed the *Initial Decision's* findings of Private Radio Bureau bias against Capitol based upon its *de novo* review of the Record.² *Decision* at ¶ 29. In its Application for Review, Capitol objects several times to these findings as being erroneous, largely on the basis that they conflict with the *Initial Decision*. The Review Board has the latitude to exercise its judgment to make its own *de novo* review of the facts,³ reversing the findings in an *Initial*

² See *Maria M. Ochoa*, 10 FCC Rcd 4323, 4324 ¶ 9 (Rev. Bd. 1995) (subsequent history omitted).

³ See, e.g., *In the Matter of Allnet Communications Services, Inc.*, 8 FCC Rcd 5629 (1993); *In re Applications of Fenwick Island Broadcast Corp., et al.*, 7 FCC Rcd 2978 (1992); *In re Applications of Mableton Broadcasting Company, Inc., et al.*, 6 FCC Rcd 393, n. 7 (1991); and *In re Application of Tri-State Broadcasting Co., Inc., et al.*, 5 FCC Rcd 3727 (1990).

Decision, where it deems such action is warranted. It is not, in and of itself, arbitrary and capricious or erroneous for the Review Board to make findings, backed by substantial record evidence, that conflict with and/or reverse findings in an *Initial Decision*.

III. Substantial Record Evidence Supports the Review Board's Findings that Capitol Violated Sections 90.403(e), 90.405(a)(3) and 90.425(b)(2) of the Commission's Rules.

4. The Review Board meticulously documented its own findings of fact underlying its conclusion that Capitol violated these rules. It based its factual findings with respect to not taking adequate precautions to avoid interference (Section 90.403(e)) and excessive testing (Section 90.405(a)(3)) firmly on record evidence.⁴ And, the Morse Code violation (Section 90.425(b)(2)) was similarly well-documented, where the Review Board noted that "the

⁴ At paragraph 8 of its *Decision*, the Review Board stated: "During the four days of monitoring the Huntington and Charleston, West Virginia shared frequency, engineers James Walker and Donald Bogert of the Commission's Baltimore Field Office repeatedly heard an unusual series of identical sequential tones unaccompanied by any messages. Tr. 112-113; 253-254. They traced the transmissions, which occurred approximately once per minute and lasted approximately twenty seconds, to Capitol's station. *Id.* Walker testified they heard the tones "morning, afternoon and evening ... perhaps as late as midnight. Tr. 134. When the engineers eventually went to perform an inspection of Capitol's station, William D. Stone, Capitol's president, told them initially that Capitol was range testing for a new control link frequency. Bureau Exh. 3, p. 3. He subsequently informed them that the testing was to determine coverage of the paging system. *Id.* After the Commission inspectors indicated that some automatic test function had to be programmed into the terminal to cause the tone sequence, Stone excused himself, Tr. 116, and Bob Wilson, Capitol's office manager, used a modem to connect them to the Huntington terminal, which contained the test set-up. *Id.*; Bureau Exh. 3, p. 3. Before the set-up could appear on the screen, however, the modem connection was severed by Capitol's Huntington office staff, and on being reconnected, disabled and the test paging had ceased. Bureau Exh. 3, p.3; Tr. 256, 275. Later, while attempting to examine the program of the paging terminal that would show how the tests had been set up, the inspectors discovered that the program had been deleted. Tr. 137; Bureau Exh. 3, p. 4. Walker recounted that he had been relayed by telephone to a secretary at the Huntington office who informed him that she had disabled the feature after becoming aware that no one was in the field to take advantage of the test paging. Bureau Exh. 3, p. 4."

inspectors observed during their monitoring that Capitol's Morse code identifier was operating at approximately 7 words per minute instead of the 20 to 25 words required by the rules...."

Decision at ¶ 9.

5. At hearing, Mr. Walker testified that the testing was not typical in his experience, that he could not explain why Capitol appeared to have deleted data that would be needed, and that Capitol's explanation of testing to establish paging coverage was invalid because Capitol was not operating at fully authorized power and there were no indications that Capitol had any employees in the field. Mr. Walker characterized the testing as "excessive." Tr. 137-139, 141-142; Bureau Exh. 3, p. 4. Notwithstanding the suspicious nature of the facts revealed by the inspection of Capitol's station,⁵ the *Initial Decision* (at paras. 83 and 97), based upon the testimony of Arthur K. Peters, Capitol's long-time paid consultant, Capitol Exh 23, p. 4, concluded that Capitol's testing activities were legitimate. The Review Board's *Decision* reversed this finding as unsupported by the record, because Mr. Peters had no specific knowledge of what Capitol was actually doing at the time the transmissions were monitored by Mr. Walker and Mr. Bogert, Tr. 1175-1176, because he only testified generally about testing, Tr. 1129-1130, and because Mr. Walker's testimony that Capitol's "testing" was "excessive" should have been credited, since he and Mr. Bogert were in a superior position to accurately assess the facts. *Decision* at ¶ 24. Both Commission engineers listened to the transmissions for nearly a week and questioned the people involved. Mr. Walker is a highly qualified field engineer with 18 years of Commission experience in enforcing radio-related rules and regulations, monitoring and investigating interference complaints, and helping to

⁵ See note 4, *supra*.

identify and resolve interference problems. Tr. 108-109. Additionally, Capitol's counsel conceded that Capitol was "not even contesting the excessive testing charge." Tr. 1049.

6. The Review Board properly concluded in its *Decision*, at ¶ 27, that Capitol was grossly neglectful in its "test" transmissions. The Review Board based this finding upon the facts that Commission inspectors repeatedly heard the transmissions over a four-day period as late as midnight although it appears there were no Capitol employees in the field, and that the transmissions continued until Capitol personnel were confronted by the unannounced Commission inspections. The Review Board also properly concluded in its *Decision*, at ¶ 27, that Capitol was slack in its Morse Code station identification. Capitol knew that the identifier was being transmitted and should have discovered that the incorrect rate of speed was being used, had it taken reasonable measures to ensure that its facility fully complied with the Commission's Rules.

IV. Substantial Record Evidence Supports the Review Board's Finding that the Private Radio Bureau Was Not Biased Against Capitol.

7. The Commission engineers entered the investigation with a neutral attitude. Tr. 1478-1480. It was only after his investigation that Mr. Walker concluded that Capitol was not serious about providing a private carrier paging service, but was merely disrupting RAM's efforts to provide such a service. Bureau Exh. 3, p. 5. Mr. Bogert reached a similar conclusion after observing the parties for nearly a week. Tr. 259. Also, Mr. Bogert noted that while RAM was candid with the inspectors and explained what had happened, Capitol never offered an adequate explanation of why it transmitted its signal over that of RAM's pages. *Id.*

8. The Private Radio Bureau's past behavior concerning Capitol and RAM does not

demonstrate uneven treatment towards Capitol. The Private Radio Bureau ruled in *favor* of Capitol in originally granting Capitol's license and overruling RAM's objections, *HDO* at ¶ 3; *Initial Decision* at ¶ 18. It admonished *both* parties in a meeting on April 2, 1991. *Initial Decision* at ¶ 26. It continued to investigate Capitol's complaints until the April 2 meeting, after which time Capitol itself no longer apprised the Private Radio Bureau concerning RAM, *id* at ¶ 31. The Private Radio Bureau initiated the investigation and inspection of *both* private paging licensees only after receiving complaints of a very serious nature that Capitol was using a device to send imitation tone paging transmissions. Finally, the Review Board correctly held in its *Decision*. at ¶ 31, that the declaration of Calvin Basham, president of Communications Service, Inc., upon which the *Initial Decision* relied to demonstrate uneven treatment, was not admitted into evidence for the truth of any matter asserted therein, and is not evidence of bias by the Private Radio Bureau. *See* ALJ ruling at Tr. 46-48, 805-806.

V. The Review Board Properly Struck the Initial Decision's Findings and Conclusions Against RAM.

9. RAM's licenses were not designated for hearing. No issues were specified against RAM. The Review Board was correct in holding in its *Decision* at ¶ 32 that findings in the *Initial Decision* that RAM has a history of causing harmful interference, and that RAM had a campaign to drive Capitol from the shared paging channel, *see generally Initial Decision* at ¶¶ 13 n.7, 61, 65, go far beyond the issues specified in the proceeding, are unsupported by the record, and should be reversed. The Review Board was also correct in holding that the record does not support these findings, except for the declaration of Calvin Basham, not offered for the truth of any matter asserted therein, and statements of Mr. Peters at Tr. 1254, 1272-1273, that are pure conjecture.

VI. Additional Briefing on These Issues is Not Warranted.

10. This is a straightforward matter. The only significant issue now before the Commission is whether the findings of the Review Board are supported by substantial record evidence. They are. There is no need for additional briefing on this matter pursuant to 47 C.F.R. § 1.115(f)(2).⁶

VII. Conclusion.

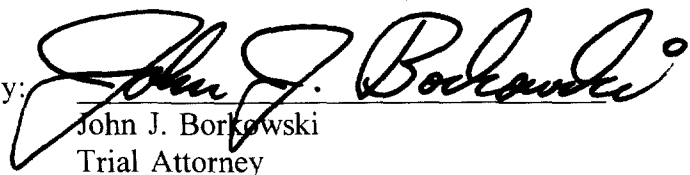
11. The limited reversal of the *Initial Decision* by the Review Board (1) is not in conflict with statute, regulation, case precedent, or established Commission policy; (2) does not involve a question of law or policy which has not previously been resolved by the Commission; (3) does not involve application of a precedent or policy which should be overturned or revised; (4) does not contain an erroneous finding as to an important or material question of fact; and (5) does not constitute prejudicial procedural error. *See* 47 C.F.R. § 1.115(b)(2). The *Decision* of the Review Board should be affirmed in all respects. Additional briefing on this matter is unnecessary.

Respectfully submitted

Michele C. Farquhar
Acting Chief, Wireless Telecommunications Bureau

April 19, 1996

By:


John J. Borkowski
Trial Attorney

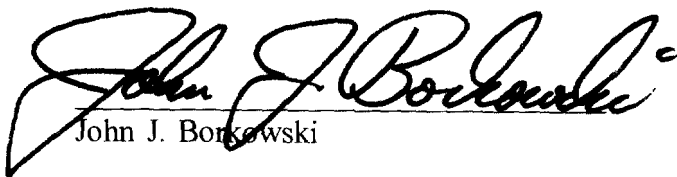
⁶ *See, e.g., In re Applications of Anchor Broadcasting Limited Partnership, et al.*, 6 FCC Rcd 721, 724, n. 1 (1991).

CERTIFICATE OF SERVICE

I, John J. Borkowski, Wireless Telecommunications Bureau, hereby certify that on this 19th day of April, 1996, copies of the foregoing Opposition to Application for Review were served by hand delivery upon the following:

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